IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMARY SUIT NO. 422 OF 1992

(Under Order XXXVII Rule 2 of Civil Procedure Code).

SHRI CHAGANLAL HARIBHAI KESUR)
Indian Inhabitant, residing at)
Archie Apartment Flat No.101,)
Plot No. 161, CTS No.1362,)
D.P. Link Road, I.C. Colony,)
Borivli (W), Bombay - 400 103.)..PLAINTIFF

Vs.

1. M/S. MAREDIA BROS. & ASSOCIATES)
unregistered partnership firm)
having their office at Barkha,)
Shanti Nagar, Bldg.No.1,)
S.V.Road, Dahisar (East),)
Bombay 400 068.)
2. MR. SADRUDDIN ALIMOHMED MAREDIA)
Adult, Indian Inhabitant,)
residing at Barkha,)
Shanti Nagar , Bldg.No.1,)
S.V.Road, Dahisar (East),)
Bombay 400 068.)

3. MR. AZAD MUSABHAI MITHANI,)
Adult, Indian Inhabitant,)
residing at B-43/44 Uday)
Apartment, Band Stand, Hill Road)
Bandra (W), Bombay 400 050.)..DEFENDANTS

Mr. Girish Desai i/b. Mr. B.N.Vaishnawa for Plaintiff.
Mr. B.H.Vyas for Defendants.

CORAM: S.K.SHAH,J.
JUDGMENT RESERVED ON 19.9.2006
JUDGMENT PRONOUNCED ON 19.9.2006.

ORAL JUDGMENT :

1. The Plaintiff has filed the suit for recovery of money on the basis of writing dated 6.11.1988.

2. Defendant No.1 is a partnership firm of which defendants Nos. 2 and 3 are the partners.

3. On 6.11.1988, the defendant No.2 approached the plaintiff and put up a proposal that the defendant No.1 was intending to purchase a plot of land at Mira Road, District Thane, admeasuring about 18000 to 19000 sq. yds. and, therefore, he required some finance so that the partnership can purchase the said plot. On

the plaintiff enquiring as to the location and further details about the description of the property, he was told that location of the plot shall be shown to him. On the said assurance, the plaintiff agreed to provide some finance to the defendants and the writing dated 6.11.1988, Exhibit "P-2" executed by the plaintiff and the defendant no.2.

4. As per the said writing, the plaintiff made payment of Rs.2,00,000/- lakhs by cheque and Rs.1,75,000/- in cash to the defendants. As per the agreement, the defendants were to purchase the plot admeasuring 18000 to 19000 sq. yds., but minimum of 18000 sq. yds. If the plot so purchased and it was sold to third party within six months, then the plaintiff would be entitled for 25% in partnership and out of profit 25% would be paid by the defendant No.1 to the plaintiff. It was further agreed that if the defendant no.1 would like to retain the said plot after six months, in that event at the end of six months i.e. on 10.5.1989, the defendant no.1 would pay the capital amount of Rs.3.75 lakhs + the profit calculated @ Rs.25/- per sq. yard out of the plot of land taking into account the minimum of 18000 sq. yds. which would come to Rs.4,50,000/- aggregating to Rs.8.25 lakhs. As such, it was agreed that Rs.8.25 lakhs would be paid by the defendants to the

plaintiff. It was further agreed that on payment of the said amount, the partnership shall be deemed to be dissolved as per law. The said agreement was signed by the plaintiff and the defendant No.2.

5. The plaintiff alleges that the defendants however failed to provide any papers pertaining to the property, viz. the plot to be purchased at Mira Road even after the expiry of the period of six months. Therefore, the plaintiff demanded payment of the amount agreed as per the agreement i.e. the principal sum of Rs.3,75,000/- and the share of profit of Rs.4,50,000/- totalling Rs.8,25,000/-. The plaintiff addressed a letter dated 23.3.1991 to defendant no.1 by Registered Post A.D. by making the demand of the said amount. The Defendant no.1 received the said notice on 27.3.1991, but failed to pay the amount. Therefore, the plaintiff filed the suit for recovery of Rs.12,72,115/-, being the principal amount of Rs.8,25,000/- and interest thereon at the rate of 21% per annum till the filing of the suit. The plaintiff also claims future interest at the rate of 21% per annum.

6. The suit is resisted by the defendants by their written statement dated 18.9.1996 while dmitting the fact of having executed the suit agreement dated

6.11.1988, they denied the suit claim. They contend that at no point of time, the partnership had come into existence. the writing was only at the stage of discussion. No deed of partnership was ever signed. The agreement was to be acted only if a particular plot of land was purchased for the purpose of the alleged partnership. While admitting to have received Rs.2 lakhs by cheque, they denied having received the cash amount of Rs.1,75,000/-. They denied the plaintiff's claim of Rs.8,25,000/- as also the claim of interest at the rate of 21% per annum. They, therefore, claimed dismissal of the suit.

7. On the basis of the above pleadings, the following issues were framed against which I have recorded my findings thereon for the reasons recorded below :-

ISSUES	**FINDINGS**
1. Whether the Plaintiff proves to have advanced an amount of Rs.2,00,000/- by cheque and Rs.1,75,000/- in cash to the Defendants ?	In the affirmative.
2. Whether the Defendants prove that the writing dated 6.11.1988 is merely proposal ?	In the affirmative.
3. Whether the defendants prove that the suit is not maintainable?	In the negative.
4. Whether the Defendants prove that the Writing dated 6.11.1988 was not to be acted upon unless the defendants acquired a plot in Mira Road ?	In the affirmative.

5. Whether the Plaintiff is entitled to interest at the rate of 21% per annum.	In the affirmative, but only at 12% per annum.
6. What Order and decree ?	Suit is decreed partly.

R E A S O N S

ISSUES NOS. 1 TO 6:

8. At the outset, it should be mentioned that the learned Counsel for the plaintiff has stated during the course of arguments that he is claiming only the amount of Rs.2,00,000/- paid by cheque and Rs.1,75,000/- paid in cash totalling Rs.3,75,000/- and interest thereon and restricting his claim to that amount only and not to the amount of Rs.8,25,000/- + interest totalling Rs.12,72,115/- as claimed by him.

9. As regards the writing dated 6.11.1988 which is produced at Exhibit "P-2", there is no dispute. A perusal of the writing itself would show that it was only a proposal to form a partnership firm in case the plot is purchased. It is only in that event the plaintiff would be entitled to profit at the rate of Rs.25/- per sq. yard of 18000 sq. yards i.e. Rs.4,50,000/-. + the principal sum of Rs.3,75,000/-. It is common ground that no plot was purchased and,

therefore, there was no question of the partnership having come into force. It is clear from the statement made by the learned Counsel for the plaintiff that the suit is only for refund of the amount of Rs.3.75 lakhs advanced by the plaintiff to the defendants which was for the purpose of purchase of plot. As the plot is not purchased, the plaintiff is claiming that amount with interest on the ground that though the amount was demanded by the plaintiff by letter dated 23.3.1991, Exhibit "P-8", the defendants failed to repay that amount.

10. There is no dispute that the defendants have received the amount of Rs.2 lakhs from the plaintiff by cheque. The only dispute is with regard to the amount of Rs.1,75,000/- which the plaintiff alleges to have paid to the defendant No.2 in cash. The agreement is executed by the plaintiff and the defendant No.2 on behalf of the defendant No.1 firm. The plaintiff in his evidence has stated that he paid the amount of Rs.1,75,000/- in cash. The defendants' witness, Sadruddin Ali Mohmed Maredia, defendant no.2 has denied to have received that amount. Perusal of the writing, Exhibit "P-2" would indicate the payment of Rs.1,75,000/- having been made in cash. On page 3 of the writing, there is clear mention of the principal sum of Rs.3.75 lakhs. Had this amount not

been paid, the principal amount would not have been mentioned as Rs.3.75 lakhs which was agreed to be paid to plaintiff. Moreover, besides the plaintiff having said on oath about giving the amount of Rs.1,75,000/- in cash, the plaintiff has stated on oath that he has made entry about this payment having been made to the defendants, in his books of accounts and has produced the original books of accounts for the period between 1.4.1988 and 31.3.1989 at Exhibits "P-11" and "P-12". Exhibit "P-11" is the Ledger Book in which there is account of defendant No.1 showing the amount of Rs.1,75,000/- having been debited by showing the payment by cash. Exhibit P-12" is the Cash Book where there is an entry about the amount of Rs.1,75,000/- having been paid to the defendant no.1. This evidence, therefore, establishes that the plaintiff had paid the amount of Rs.3,75,000/- to the defendant no.2. This was not the first time where the plaintiff had paid the amount in cash. The defendant has admitted in cross-examinatiion that earlier also there was similar payment made by the plaintiff to the defendants in cash and the plaintiff was required to file a suit which came to be decreed against the defendants where the amount was Rs.6 lakhs. Therefore, I have no hesitation to hold that the plaintiff has proved that he had paid Rs.3,75,000/- to the defendants as indicated in the agreement, Exhibit

"P-2".

11. Demand of this amount was made by the plaintiff by his letter dated 23.3.1991. The defendants received the said letter as per the acknowledgment receipt, Exhibit "P-10". The defendants however failed to repay the amount. Therefore, the plaintiff was required to file the suit.

12. The learned Counsel for the defendants contended that the suit is not maintainable as the partnership was not registered. However, this contention is devoid of any merit. In fact, there was no partnership at all. The agreement indicated that if the plot was purchased, then alone the partnership would come into existence whereupon the plaintiff would be entitled to 25% share in the profit. However, no such plot was ever purchased and, therefore, there was no partnership. Therefore there is no question of the suit not being maintainable.

13. Under the circumstances, the issue No.1 is answered in the affirmative. As regards issue No.2, it was obviously a proposal for the partnership. Therefore, that issue is answered in the affirmative. Issue No.3 is answered in the negative. Issue No.4 is answered in the affirmative.

14. As regards payment of interest, the plaintiff is entitled to recover the principal sum of Rs.3,75,000/- with interest. The interest claimed by the plaintiff is 21% per annum. However, it is on the higher side. Therefore, according to me, since it was a commercial transaction of 1988, the plaintiff would be entitled to claim interest at 12% per annum from the date of notice till realisation of claim. Issue No.5, therefore, is answered in the affirmative, but only at 12% per annum.

15. Hence the order :-

O R D E R

The Suit is partly decreed as follows :-

The Defendants shall pay to the Plaintiff Rs.3,75,000/- with interest thereon at the rate of 12% per annum from the date of the notice i.e. 23.3.1991 till the date of filing of the suit and at the same rate from the date of filing of the suit till the realisation of the decretal amount. The Defendants shall pay to the Plaintiff the proportionate costs. Decree be drawn accordingly.

16. The learned Counsel for the defendants prays for stay of the decree as he wants to go in appeal. The decree shall be stayed for a period of six weeks from today.

17. Certified Copy and sealing of the decree be expedited.

(S.K.SHAH,J.)